

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 17, 2006 Session

VICTORIA LEE WHEATLEY WALKER v. BRUCE ELTON WALKER

**Appeal from the Circuit Court for Davidson County
No. 03D-2355 Carol Soloman, Judge**

No. M2005-01561-COA-R3-CV - Filed May 12, 2006

This appeal involves the dissolution of a seventeen-year marriage where the parties were granted a divorce on the basis of mutual inappropriate marital conduct. Husband appeals the trial court's custody award, child support award, alimony award, and award of attorney's fees. We affirm in part, reverse in part, and remand the case to the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part, and Remanded**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Jon S. Jablonski, Nashville, Tennessee, for the appellant, Bruce Elton Walker.

Thomas J. Drake, Jr., Nashville, Tennessee, for the appellee, Victoria Lee Wheatley Walker.

OPINION

Mr. Bruce Walker and Mrs. Victoria Wheatley Walker were married on January 30, 1988. There were two sons born from the marriage, the eldest child reaching the age of majority on May 26, 2006, and the youngest will reach the same on September 2, 2007. Wife filed a complaint for divorce on October 3, 2003, alleging inappropriate marital conduct and seeking custody of the minor children, child support, alimony, and an equitable division of the marital property. Husband filed an answer and counter-complaint on November 12, 2003.

At the time of divorce, Wife was employed as a house manager for Dr. and Mrs. Shirley Horowitz, earning a gross income of \$29,605.00 according to her 2004 W-2 form. Husband was employed by CoinMach Corporation, earning \$17.00 per hour which according to his February 12, 2005, paystub grossed \$1,360.00 for a two-week pay period. Husband was also employed as a member of the Air National Guard, netting \$496.68 per month. The trial court found that Husband had the capacity to earn \$65,000.00 per year.

On April 22, 2005, the court entered a final decree of divorce, finding that the parties should be divorced on the grounds of mutual inappropriate marital conduct. The court also declared Wife primary residential parent and awarded her rehabilitative alimony for fifteen (15) years on a graduated scale, child support, and COBRA insurance paid by Husband for three (3) months. On June 13, 2005, the trial court awarded Wife \$5,000.00 in attorney's fees and \$664.00 in discretionary costs based on Wife's May 5, 2005, motion.

On appeal, Husband asserts that the trial court erred in (1) awarding custody of the parties' children to Wife; (2) the length and amount of alimony awarded to Wife; (3) the amount of child support awarded to Wife; and (4) the award of attorney's fees to Wife. The review in a non-jury case is *de novo* upon the record with a presumption of correctness as to the trial court's factual findings unless the evidence preponderates otherwise. *Mitts v. Mitts*, 39 S.W.3d 142, 144 (Tenn.Ct.App.2000). "The trial court's conclusions of law are not accorded the same deference." *Mitts*, 39 S.W.3d at 144.

I. Custody

"In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child." Tenn.Code Ann. § 36-6-106(a). Tennessee Code Annotated section 36-6-106(a) lists a set of non-exhaustive factors which should be considered in determining the best interest of the child, including:

- (1) The love, affection and emotional ties existing between the parents and child;
- (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that where there is a finding, under § 36-6-106(a)(8), of child abuse, as defined in §§ 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a non-perpetrating parent has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;
- (4) The stability of the family unit of the parents;
- (5) The mental and physical health of the parents;
- (6) The home, school and community record of the child;

(7)(A) The reasonable preference of the child if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, as defined in §§ 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

(10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Tenn.Code Ann. § 36-6-106(a).

The trial court made an oral ruling on March 22, 2005, following the bench trial, which declared Wife primary residential parent, although providing Husband with liberal visitation. In making its determination, the court found that Wife was the more nurturing parent who assumed most of the responsibility for raising the children. The court also found that although Husband was a good father, he was not often present during the children's childhood. The court mentioned that many of Husband's behaviors were detrimental to the children's upbringing and overall welfare and that Husband's morals were questionable. The evidence presented at trial revealed that Husband had allegedly committed adultery on multiple occasions and that he filed a false police report and insurance claim in the presence of and with the assistance of the eldest child. Furthermore, Husband was shown to have viewed pornography on the family computer while the children were present in the home and to smoke cigarettes around the children on a regular basis.

This Court discussed the elements of the best interest analysis in *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn.Ct.App.1983), stating:

[The child's best interest] is and must remain the true test for the award of custody. To arrive at the point of deciding with whom to place a child in preparation for a caring and productive adult life requires consideration of many relevant factors, including but certainly not limited to the age, habits, mental and emotional make-up of the child and those parties competing for custody; the education and experience of those seeking to raise the child; their character and propensities as evidenced by their past conduct; the financial and physical circumstances available in the home of each party seeking custody and the special requirements of the child; the availability and extent of third-party support; the associations and influences to which the child is most likely to be exposed in the alternatives afforded, both positive and negative; and where is the greater likelihood of an environment for the child of love, warmth, stability, support, consistency, care and concern, and physical and spiritual nurture.

668 S.W.2d at 666.

We believe that the record supports the trial court's award of custody to Wife. The trial court specifically found that Wife had been the primary caregiver of the children and that Husband was not actively involved in the children's lives with the exception of his participation in the boys' extracurricular sports. In addition, the youngest child testified that his preference was to live with his mother. The trial court accepted the testimony of the wife as to these matters and this credibility determination is accorded due deference on appeal. *Bowman v. Bowman*, 836 S.W.2d 568 (Tenn.Ct.App.1991).

II. Rehabilitative Alimony

The trial court has broad discretion in determining whether spousal support is required and if so, the nature, amount, and duration. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn.2004). As such, appellate courts are disinclined to alter a trial court's spousal support decision unless an incorrect legal standard was applied or the decision reached is clearly unreasonable. *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn.2001). The determination of the type, amount and duration of spousal support is a fact-intensive inquiry, which requires the court to consider the various factors listed in Tennessee Code Annotated section 36-5-101(d)(1), which was in effect at the time of the final hearing in this action. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn.2002). These factors include:

- (A) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;

- (C) The duration of the marriage;
- (D) The age and mental condition of each party;
- (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
- (G) The separate assets of each party, both real and personal, tangible and intangible;
- (H) The provisions made with regard to the marital property as defined in § 36-4-121;
- (I) The standard of living of the parties established during the marriage;
- (J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
- (L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn.Code Ann. § 36-5-101(d)(1) (2005) (current version at Tenn.Code Ann. § 36-5-121(i)).

Husband first argues that the trial court erred in the amount of alimony awarded to Wife by overvaluing his annual income and hence, his ability to pay. The only evidence entered into the record which indicated Husband's gross income was his CoinMach Corporation paystub and his Air National Guard paystub. The paystubs showed that Husband earned approximately \$38,600.00 a year. However, Husband testified at trial that he received a lot of overtime. He further conceded in his April 15, 2005, motion to alter or amend the judgment that taking into account his overtime, he has the ability to earn \$47,231.88 a year.

Despite this evidence, the trial court made the factual finding that Husband had the ability to earn \$65,000.00 per year. The court stated in its April 22, 2005, order:

3. The Court finds that the Wife, at age fifty-four years, has little opportunity for work if her current employment ends and further is in need of rehabilitative alimony. The Court finds that the Wife does not have any retirement, is in need of further education in order to support herself and has the need for rehabilitative alimony for the next fifteen years. The Court finds that there is a disparity in income between the Husband and the Wife and the Court specifically finds that the Husband makes approximately \$65,000.00 per year and the Wife makes just less than \$30,000.00 per

year. The Court finds that the Husband has the ability to pay, and hereby orders the Husband to pay, alimony according to the following schedule:

- a. \$600.00 per month beginning April 1, 2005 until older child shall graduate from high school and be eighteen years of age, at which time shall increase to \$900.00;
- b. When the younger son, Trevor, graduates from high school and reaches eighteen years of age, and beginning on that date the rehabilitative alimony in the amount of \$1,200.00 per month until April 2020. It is the intent and aim of the Court for the Husband to pay a total of fifteen years in rehabilitative alimony under the above schedule.

We cannot find any evidence in the record to support the trial court's finding that Husband has the ability to earn \$65,000.00 a year. Since the two factors considered most relevant in determining the amount and type of alimony awarded in a proceeding are the economically disadvantaged spouse's need and the obligor spouse's ability to pay, *Robertson*, 76 S.W.3d at 342, we must reverse the trial court's alimony award and remand the case to the trial court to determine the appropriate amount of alimony. On remand, the court should use the amount of \$47,231.88 as Husband's annual income to calculate the award.

Husband next argues that the trial court erred in awarding Wife rehabilitative alimony for fifteen years because Wife testified at trial that it would only take her two years to complete the additional educational requirements necessary to rehabilitate herself. When asked about the award of alimony, Wife testified:

Q. Ms. Walker, if you'll tell the Judge how much alimony you would want per month and why?

A. I'd like to continue my education. I'd like to go back to school and become an ultrasound technician. I like my medical field.

Q. Are you going to be able to work for Dr. and Ms. Horowitz if you do that?

A. I don't know. I don't think I can.

Q. The Judge wants to know a dollar amount per month you are asking for as alimony.

A. What's fair. I mean, I don't know. I've never had alimony.

THE COURT: Is she asking for alimony in futuro?

Q. You are asking for – are you asking for alimony forever, or are you asking for rehabilitative alimony just until you –

A. Until I get through school.

...

Q. What kind of school?

A. I want to be an ultrasound technician.

Q. I missed that part. Who teaches that?

A. It's through a school. You have to register and go to school.

- Q. What school?
A. I think Vanderbilt does.
Q. Have you applied for it?
A. Not yet.
Q. You're already trained as a medical technician?
A. Yes, I am.
Q. Medical assistance?
A. Yes, I am.
Q. How long – how long a school is that? How long a curriculum, how many years or how many months?
A. I think it's two years.
Q. You think?
A. I think.

Although we agree with the trial court that Wife is economically disadvantaged as to Husband, we do not believe that it will take her fifteen years to achieve an earning capacity that provides a standard of living reasonably comparable to the standard of living enjoyed by the parties during the marriage. By Wife's own admission, she only needs two years to complete the additional education necessary to become an ultrasound technician. In addition, Wife presented no testimony evidencing any mental or physical infirmities and the court found that the parties were mutually at fault for the deterioration of the marriage. We would also note that the parties' youngest child will reach the age of majority in September 2007. Based on the foregoing, we find that the trial court erred in awarding Wife rehabilitative alimony for fifteen years and thus, reduce the alimony award to five years. We believe that five years will provide Wife a sufficient amount of time to complete her additional educational requirements while continuing to care for the parties' youngest child until he graduates from high school.

III. Child Support

The final parenting plan entered on April 22, 2005, provided, "The Father will pay child support, in accordance with the Tennessee Child Support Guidelines, in the amount of \$868.00, per month, payable bi-weekly by wage assignment." In making its child support determination, the court again used the arbitrary amount of \$65,000.00 as Husband's annual income. Because we have already determined that this figure is unsupported by the record, we remand the case to the trial court to decide the appropriate amount of child support using \$47,231.88 as Husband's annual income.

IV. Attorney's Fees

The final issue raised on appeal concerns whether the trial court erred in awarding Wife \$5,000.00 in attorney's fees and \$664.00 in discretionary costs. Husband argues that Wife is not entitled to this award because neither party has any liquid assets and the marital estate was divided equally between the parties.

Trial courts have discretion to make awards to help a spouse defray his or her legal expenses in a divorce case. *Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn.1983); *Loyd v. Loyd*, 860 S.W.2d at 413. These awards are appropriate, however, only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, *Houghland v. Houghland*, 844 S.W.2d 619, 623 (Tenn.Ct.App.1992); *Ingram v. Ingram*, 721 S.W.2d at 264, or would be required to deplete his or her resources in order to pay for these expenses. *Harwell v. Harwell*, 612 S.W.2d 182, 185 (Tenn.Ct.App.1980).

Brown v. Brown, 913 S.W.2d 163, 170 (Tenn.Ct.App.1994).

The parties own a property at 1013 Floy Lane in Ashland City, Cheatham County, Tennessee, with an approximate value of \$100,000.00. In the final decree of divorce, the court ordered the parties to sell the property and equally divide the proceeds. We believe that once this property is sold, Wife will have sufficient resources to pay her attorney's fees and discretionary costs. Accordingly, we vacate the portion of the trial court's judgment awarding Wife \$5,000.00 in attorney's fees and \$664.00 in discretionary costs.

The decision of the trial court is affirmed in part, reversed in part, and remanded to the trial court for whatever other proceedings may be required. The costs of appeal are assessed equally between the parties.

WILLIAM B. CAIN, JUDGE